in which the plaintiff recovered, and that was in an action for special damages sustained by publication of libel affecting plaintiff's business.

D. A. M.

Wills: Condition Determined by Future Event or Act: Doctrine of Incorporation by Reference.—In view of the nature of the condition attached to the devise, there will doubtless be little cause for regret that the court in the matter of the Estate of Budd[1] held the condition void and decreed that the devisee should take the property free from any restriction. A stipulation that a youth, when he arrives at the age of twenty-one, shall declare his intention to carry out the objects and purposes of a "Christ Doctrine Revealed and Astronomical Science Association" is not likely to meet with general approval. The legal ground on which the Supreme Court of California rested its decision, however, may be the occasion for some difference of opinion. The testatrix in her will left property to the devisee on condition that upon attaining the age of twenty-one he should in writing declare that he would carry out the objects and purposes indicated in the articles of incorporation of the above named association. As a matter of fact, the association was not in existence at the date of the making of the will, but was incorporated several days subsequently, by the testatrix and others. Counsel for all the parties interested in the will based their various contentions, opposite in ultimate result, upon the premise that this condition was void, since dependent on the articles of a corporation not in existence at the date of the will. In this view both the trial judge and department two of the Supreme Court acquiesced.

Had counsel differed in their contentions and the question been strongly pressed, it may well be a matter of conjecture whether the court would not have held otherwise. As gathered from the brief reference in the opinion and from the argument made in counsel's briefs, the holding is apparently based on what is known as the doctrine of incorporation by reference. It is a recognized rule that when a separate document is referred to in a will, if it is to be incorporated therein and given testamentary effect, it must have been in existence when the will was made.[2] But do the facts in question present a case calling for the application of this rule? To give effect to the condition, was it necessary that the articles of the association be incorporated into the will and given testamentary effect? Was not the condition sufficiently indicated in the will itself, but with its exact terms, merely, left to be determined by a future event not testamentary in character?

In Yates v. University College, London,[3] a case decided by the House of Lords, a legacy had been left on a condition almost identical in character with the condition in the present case. The testator

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[1] (Oct. 6, 1913) 46 Cal. Dec. 342, 135 Pac. 1131.

[2] Jarman on Wills, 6 Am. Ed. p. 132.

[3] (1875) L. R. VII H. L. C. 438; (1873) L. R. 8 Ch. App. 454.

had bequeathed a certain sum to the college for the purpose of founding a professorship of Archaeology, and had specified that the bequest should be on condition that the college accepted such rules for the regulation of the professorship as he proposed to prepare for that purpose. These rules were never framed by the testator, and it was held that the condition was subsequent, and that since it could not be performed, the bequest was absolute and valid. The court implied that had the testator prepared the rules, however, the condition would have been effective. In none of the three decisions of the case, given by different courts, was it even intimated that the condition was invalid because it required the acceptance of a code of rules not in existence at the time the will was made. The case was decided a number of years after that of Allen v. Maddock,[4] the leading authority on the doctrine of incorporation by reference, and it is hardly conceivable that, were this doctrine applicable, at least some mention of it would not have been made, even though the decision were rested on the other ground.

The doctrine of incorporation by reference applies, for example, to a case where there has been a bequest of certain articles as specified in another document,[5] or a bequest to certain persons named in another paper,[6] or where property is left in trust for purposes as elsewhere indicated.[7] Clearly, the fundamental purpose and effect of these supplementary documents is testamentary, and to give them validity, it is necessary that they be in existence at the time the will is executed. But whether the extrinsic factor be a document or an act, if its nature is not testamentary, the doctrine of incorporation by reference should have no application. The extrinsic document or act may be one to be executed in the future by the testator himself, and nevertheless be fully effective. For instance, property may be left to those persons with whom the testatrix shall be in partnership at the time of her death;[8] or to the one who shall take care of the testatrix in her old age at her request;[9] or such sums may be deducted as advancements as shall appear on the books of the testator at the time of his death.[10] In all of these cases, as in the principal case, it may be objected that the disposition depends upon the volition of the testator exercised subsequently to the making of the will. But the answer to this contention is, that this "subsequent volition cannot be deemed or considered in a legal sense as testamentary in its nature or character."

W. W. F., Jr.

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[4] (1858) 11 Moo. P. C. 427.
[5] Goods of Truro, (1866) L. R. 1 P & D. 201.
[6] Goods of Smart, (1902) L. R. 1902 P. 238.
[7] Bryan's Appeal, (1904) 77 Conn. 240, 58 Atl. 748.
[8] Stubbs v. Sargon, (1838) 3 My. & Cl. 507.
[9] Dennis v. Holsapple, (1897) 148 Ind. 297, 47 N. E. 631.
[10] In re Moore, (1900) 61 N. J. Eq. 616, 47 Atl. 731.
[11] Dennis v. Holsapple, supra.